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No. 00-347

IN THE
Supreme Court of the United States

THE WHARF (HOLDINGS) LTD., WHARF COMMUNICATIONS INVESTMENTS LTD., AND STEPHEN NG,
Petitioners,

v.

UNITED INTERNATIONAL HOLDINGS, INC. AND UIH ASIA INVESTMENT CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' Questions Presented assume important facts contrary to the jury's verdict and assume legal premises contrary to the rulings of the courts below. A proper statement of the questions petitioners seek to present is as follows:

1. Whether the district court had jurisdiction (a) under 28 U.S.C. § 1331 over a case in which respondents' complaint alleged that petitioners came to Colorado, sold respondent United International Holdings, Inc. ("UIH") a security (an option), and in connection with that sale made material misrepresentations in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and (b) under 28 U.S.C. § 1367 over claims arising out of the same facts for violation of the Colorado Securities Act, common law fraud, breach of fiduciary duty to a joint venture partner, and breach of contract.

2. Whether the anti-fraud provisions of the federal securities laws apply to the sale of an option, in Colorado, to a U.S. buyer, by a foreign seller.

3. Whether the district court properly applied Colorado law rather than Hong Kong law to claims of common law fraud, breach of fiduciary duty, and breach of contract arising out of the same sale, where there was no agreement on choice of law and no pertinent difference between Colorado and Hong Kong law was identified to the district court.

4. Whether a deliberate and material misrepresentation, made at the time of and in connection with the sale of a security (an option), about the issuer's intentions to perform its obligations under the option, violates Section 10(b) and Rule 10b-5, even though the misrepresentation

does not concern the value of the stock subject to the option.

5. Whether the testimony of an expert witness, whose qualifications and pertinent testimony were unchallenged at trial, that the "value lost by UIH" because of petitioners' wrongdoing was $67,000,000, together with other evidence including the unchallenged testimony of a second expert that the first expert's methodology was proper, was sufficient evidence to support a verdict for compensatory damages of $67,000,000; and whether the jury, acting on instructions that were unchallenged at trial, properly awarded $58,500,000 in exemplary damages where, as the court of appeals concluded, "[t]here was ample evidence [of 'willful and wanton conduct'] to support the jury award."

RULE 29.6 STATEMENT

Respondent United International Holding, Inc. ("UIH"), now called UnitedGlobalcom, Inc., is a publicly held company with no other parent. Liberty Media Corporation owns more than ten percent of the stock of UnitedGlobalcom, considering all classes of stock together.

Respondent UIH Asia Investment Company is a general partnership with no other parent. UnitedGlobalcom owns 80 percent of the stock of UIH Asia Investment Company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

Petitioners have not identified any reason for this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter. Respondents file this brief primarily to correct numerous misstatements in the petition.

STATUTES INVOLVED

28 U.S.C. § 1331 provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367 provides as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> > (1) the claim raises a novel or complex issue of State law,
> >
> > (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> >
> > (3) the district court has dismissed all claims over which it has original jurisdiction, or

> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
>
> (e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, are set out in Appendices G and H to the Petition ("Pet. App.").

STATEMENT

After an 11-week trial, a unanimous ten-person jury in the District of Colorado found petitioners liable for securities fraud in violation of both SEC Rule 10b-5 and the Colorado Securities Act, common law fraud, breach of fiduciary duty to a joint-venture partner, and breach of contract. Answering special interrogatories on each element of each claim, the jury returned separate special verdicts awarding compensatory damages of $67,000,000 on each of these claims, and it awarded $58,500,000 in exemplary damages on the common law fraud and breach of fiduciary duty claims. Since respondents were entitled to only one recovery, the district court entered judgment for $125,500,000, adding prejudgment interest as required by Colorado law. After a hearing, the district court rejected Wharf's post-trial motions to set aside the verdict. On

appeal, the Tenth Circuit rejected all of Wharf's contentions at length without dissent.

The Facts Proved at Trial

In this Court, petitioners recite as "facts" their own contentions at trial, which the jury resoundingly rejected. The case that respondents proved to the jury is barely discernible from the petition. That case may be briefly summarized as follows.

Respondent United International Holdings, Inc. ("UIH") (now called "UnitedGlobalcom") is a Denver, Colorado-based company that invests in, owns, and operates cable television systems worldwide. In 1991, the government of Hong Kong advertised for bids for an exclusive license for the operation of a cable television system in Hong Kong. At that time, petitioner Wharf was a Hong Kong conglomerate without any significant experience in cable television. (*See* Pet. App. at B-2.) Wishing to bid but lacking the experience and credibility needed to win, Wharf sought and obtained UIH's help. UIH provided massive and indispensable assistance, including use of UIH's widely respected name, the full-time services of certain senior UIH personnel, and UIH's expertise in developing a business plan, designing the cable system, recruiting key personnel, obtaining financing, and negotiating with suppliers. (*See* Pet. App. at B-3.) With that assistance, Wharf bid for the franchise on September 30, 1992, won the award effective June 1, 1993, and began cablecasting in October 1993. (*See* Pet. App. at B-6, 8, 9.)

At trial, UIH proved that Wharf obtained UIH's assistance by a prolonged scheme of deliberate fraud and by the breach of fiduciary and contractual duties owed to UIH. UIH made it clear to Wharf at their initial meetings that UIH was not a consulting firm and would not provide its services for a fee, but instead would help Wharf only in return for a right to invest. (*See* Pet. App. at B-2.) Wharf understood

and purported to accept this, repeatedly referring to UIH as its "cable partner" (Pet. App. at B-3) and "strategic partner" (Pet. App. at B-7). When Wharf failed to describe UIH's investment rights in its franchise bid, as it had told UIH it would, UIH insisted on an explicit grant of an option to invest, as the price of UIH's continued support, including additional services that Wharf requested at a meeting on October 8, 1992, in Denver. At this meeting, and in consideration for the help that it asked UIH to provide, Wharf sold UIH an option to acquire 10% of the stock of the company formed to hold the cable franchise. (*See* Pet. App. at B-6-7.) Under the option, the "exercise price" was that UIH would be required to pay 10% of the equity capital required to fund the cable project. (*See id.*) The price UIH was required to pay for the option was its continued services and support for the project. There has never been any dispute that UIH made this payment in full. After October 8, UIH, having acquired the option, continued to provide its name, support, and services to Wharf, and Wharf continued to assure UIH of its investment rights — until the system was operating. But (as UIH proved), Wharf had misrepresented its intentions on October 8, 1992 and had secretly intended from the beginning never to allow UIH to invest. (*See* Pet. App. at B-36) After stalling until it believed it no longer needed UIH's help, Wharf refused to honor the option. (*See* Pet. App. at B-9-11, 36, 37-38.)

UIH proved, through two expert witnesses with unchallenged credentials, as well as other evidence, that the net value UIH lost as a result of Wharf's intentional misconduct was $67,000,000. (*See* Pet. App. at B-32-33.)

Proceedings Below

The jury awarded $67,000,000 in compensatory damages. Based on Wharf's "reprehensible conduct," which included "deliberate misrepresentations and nondisclosures" over a "protracted period of time," the jury also awarded UIH

$58,500,000 in punitive damages. (Pet. App. at B-37, 38.) The district court added prejudgment interest as required by Colorado law. (*See* Pet. App. at B-39.)

Wharf filed post-judgment motions that the district court (Kane, J.) carefully considered and rejected. In particular, Wharf contended — raising the issue for the first time at the hearing after the post-trial motions had been briefed — that UIH counsel had "misrepresented" the expert damage testimony to the jury. (Pet. App. at C-12-13.) The district court rejected this challenge as both untimely and wrong, and it ruled that the evidence fully supported the jury award. (*See* Pet. App. at C-33-34.) Wharf also asked the district court to reduce the exemplary damages award, but the court found the award fully justified by Wharf's conduct. (*See* Pet. App. at C-35.)

The Tenth Circuit affirmed in a lengthy opinion that considered and rejected each of Wharf's challenges, generally on two or more independent grounds. In particular:

Jurisdiction. The Tenth Circuit rejected Wharf's jurisdictional challenge on the grounds that (i) a federal district court has "federal question" jurisdiction if the complaint states a federal claim that is not "obviously without merit" or "wholly frivolous" or "clearly foreclosed by prior decisions of the Supreme Court," and the court's jurisdiction "does not fluctuate with the fate of the federal claim at trial or on appeal" (Pet. App. at B-13 (citations omitted)); (ii) in any event, "after conducting [the Tenth Circuit's own] review, we are convinced that UIH's allegations not only are substantial and nonfrivolous, but state an actionable 10b-5 claim sufficient to withstand a motion to dismiss" (Pet. App. at B-15); and (iii) the district court had both constitutional and statutory authority to exercise jurisdiction over the closely related state law claims. (*See* Pet. App. at B-13, 18).

Choice of law. The Tenth Circuit rejected Wharf's contention that Hong Kong law should have been chosen and that this would have defeated subject matter jurisdiction on the grounds that (i) "[w]e disagree with the premise . . . [that] choice of law issues implicate a court's subject matter jurisdiction" (Pet. App. at B-18); (ii) "Wharf has not presented any choice of law issue with respect to UIH's Rule 10b-5 claim" that Wharf made material misrepresentations (inter alia) in Denver in connection with the sale of the option to UIH (Pet. App. at B-19); (iii) "Wharf has not identified any . . . international choice of law issues that would reasonably compel a court to decline to exercise its jurisdiction . . . [and] has presented scant evidence that . . . Hong Kong law applies to the dispute at issue" (Pet. App. at B-20); and (iv) Wharf's excerpts from unsigned documents are "virtually irrelevant" (*id.*).

The Merits of the Rule 10b-5 Claim. The Tenth Circuit rejected Wharf's challenge to the Rule 10b-5 verdict on the merits, ruling that UIH had properly alleged each of the elements of such a claim: an untrue statement of a material fact, made with scienter in connection with the sale of a security, on which UIH relied and suffered damages as a proximate result. (*See* Pet. App. at B-14-15). Wharf did not contest on appeal that the option at issue was a "security" as defined in the Securities Exchange Act of 1934. The court ruled that, having purchased the option on October 8, 1992, (i) UIH was an "actual purchaser" within the meaning of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Pet. App. at B-16) and (ii) Wharf's "secret reservation not to fully perform" its obligations under the option constituted a material misrepresentation in connection with the sale of a security that was made with scienter in violation of Rule 10b-5. (Pet. App. at B-17.) The court rejected Wharf's contention that its ruling would create a conflict with other circuits, noting that two of the three cases Wharf cited involved mere breaches of contract — not misrepresentations in connection with the sale of an option or

any other security (*see id.*) — and that the third case was distinguishable on its facts and cited by Wharf only for *dicta* that the deciding circuit itself had subsequently questioned (*see* Pet. App. at B-17-18 & n.1).

Compensatory Damages. The Tenth Circuit rejected Wharf's challenge to the compensatory award, based on a supposed failure of UIH's expert witness to deduct $50,000,000 in capital costs that UIH would have been required to pay to exercise the option, ruling that (i) Wharf failed to preserve the issue because it had not raised the issue in any way at trial and "has not satisfied the 'specific grounds' requirement [of Fed. R. Civ. P. 50] no matter how liberally we construe it" (Pet. App. at B-31); (ii) the expert's analysis in any event did reflect a deduction of the amount in question (*see* Pet. App. at B-31-32); and (iii) "[t]hus, the evidence introduced at trial supported the jury's $67,000,000 compensatory damage award" (Pet. App. at B-32).

Punitive Damages. The Tenth Circuit rejected Wharf's challenge to the punitive damage award, ruling that "[t]here was ample evidence to support the jury award" under state law. (Pet. App. at B-36). It also rejected the claim that the award was "grossly excessive" under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), noting that "the evidence depicts reprehensible conduct" (Pet. App. at B-37, 39), and that the punitive award was only 87% of the compensatory award it had sustained (*see* Pet. App. at B-39).[1]

Wharf's petition for rehearing en banc was denied without comment.

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[1] The Tenth Circuit also affirmed the district court in rejecting Wharf's state-law argument that the option was unenforceable under a since-repealed Colorado statute, finding the argument untenable on several independent grounds. (*See* Pet. App. at B-21-25.) *See infra* pp. 18-20.

Petitioners' Mischaracterization of the Facts and Legal Assumptions in the Litigation Below

Throughout its petition, Wharf mischaracterizes the contentions in this case (both its own and UIH's) and recites as facts, or as undisputed legal assumptions, matters that were fully litigated below and which it *lost* before the jury or in legal rulings. Some examples follow:

- Wharf casually refers to UIH as a "consulting company" (Pet. at 7) when it knows that the status of UIH was contested at trial and that UIH proved, and the jury found, that UIH was not a consultant but a developer and owner of several cable systems and, accordingly, was not willing to lend its name and reputation to Wharf's cable television project or to provide the services Wharf requested on a fee basis but only in return for an opportunity to invest in Wharf's cable system (*see* Pet. App. at B-2.)

- Wharf repeatedly asserts that UIH offered "no proof of damages in excess of $900,000" (Pet. at i, 24, 25, 28, 29, 30), UIH's out of pocket expenses, when it knows that UIH presented expert testimony, unchallenged at trial and relied on by the Tenth Circuit, that the "value [of] UIH's loss" was $67,000,000 (Pet. App. at B-32), as well as other testimony that the value of the services UIH was defrauded into providing was in a similar range (*see* Pet. App. at B-33-34).

- Wharf repeatedly describes the security at issue in this case — an option — as "unenforceable." (Pet. at i, 18, 19, 21.) Wharf is well aware that the enforceability of the option was extensively litigated below and sustained on multiple state-law grounds. (*See* Pet. App. at B-21-25.)

- Wharf refers to "the parties' choice of Hong Kong law" (Pet. at i) as if that choice were an acknowledged fact,

even though it knows that (i) this supposed choice is not a component of the October 8, 1992 agreement (*see* Pet. App. at B-20); (ii) Wharf raised the issue of choice of law at trial only in connection with a forum non conveniens motion that it did not subsequently pursue (*see* Pet. App. at B-18-19); and (iii) Wharf's position on choice of law was considered and rejected by both courts below (*see* Pet. App. at B-20-21).

- Wharf seeks to quarrel in this Court about the very existence of the option (*see* Pet. at 3) when it knows that its grant of the option was proved at trial by the testimony of several witnesses and abundant documentary evidence, that the jury found that Wharf had granted the option, and that both courts below sustained that finding as supported by substantial evidence (*see* Pet. App. at B-28-29).

- Wharf asserts that UIH "paid nothing" for the option (Pet. at 3), when it knows that UIH proved, and the jury found, that UIH paid for the option with its name, reputation, badly needed expertise, industry contacts, and several thousand hours of direct services of senior UIH personnel, all of which the evidence showed had very substantial value to Wharf (*see* Pet. App. at B-3).

- Wharf asserts that the option had an "exercise price" of $50,000,000 (Pet. at 3), in an effort to confuse the issue about the measure of damages and the expert testimony on that subject, when it knows, and the Tenth Circuit clearly understood and explained, that there was no such amount separate from the capital contribution UIH expected to make in the project, which the expert witness duly netted out (Pet. App. at B-32).

- Wharf repeatedly states that UIH counsel (which includes all three firms appearing on this brief) "deliberately misrepresented" (Pet. at 3, 7, 10, 14, 16, 25, 29) the expert testimony on damages when it knows

that (i) it made no objection at trial to the supposed misrepresentation and (ii) both courts below carefully reviewed the matter and agreed with UIH (*see* Pet. App. at B-32).

ARGUMENT

Nothing about this case warrants this Court's review. There is no conflict between circuits and no issue of general importance. Each of Wharf's present legal contentions was rejected below on multiple independent grounds. The judgment for compensatory damages could rest on any of five verdicts and the judgment for punitive damages could rest on either of two — but as the courts below found, UIH proved egregious fraud and willful and wanton conduct with substantial evidence and all of the verdicts are fully justified.

I. THERE IS NO CIRCUIT CONFLICT.

Petitioners assert no fewer than five circuit conflicts in their description of the Tenth Circuit opinion. (*See* Pet. at 10-16). None of the alleged conflicts is real.

The only alleged conflict involving federal substantive law is petitioner's contention that the Tenth Circuit disagreed with circuits that have refused to apply Section 10(b) and Rule 10b-5 to "disputes over the ownership of securities." (*See* Pet. at 10-11 (citing *Gurwara v. LyphoMed, Inc.*, 937 F.2d 380 (7th Cir. 1991); *Stanford v. Humphrey*, No. 88-3997, 1990 WL 4659 (9th Cir. Jan. 25, 1990) (unpublished); *Hunt v. Robinson*, 852 F.2d 786 (4th Cir. 1988); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976)).) But as the Tenth Circuit carefully explained in distinguishing those cases (*see* Pet App. at B-17-18), this case does not involve a mere dispute over ownership but a misrepresentation in connection with a completed sale. By contrast, the plaintiffs in *Hunt* and *Tully* alleged only breaches of contracts to sell

securities, not misrepresentations. (*See* Pet. App. at B-17.)[2] *Stanford*, an unpublished Ninth Circuit opinion that Wharf did not bring to the attention of the Tenth Circuit, also involved only a breach of contract claim and relied exclusively on *Hunt*. Although *Gurwara* did involve allegations that the defendant had misrepresented plaintiff's rights to purchase defendant's stock under an employee stock option plan, the plaintiff in *Gurwara* alleged that the stock was the "security" at issue and did not allege that defendant's misrepresentations had any bearing on plaintiff's purchase of the options. The Seventh Circuit expressly declined to consider "[w]hether [plaintiff] might have sued successfully under section 10(b) for misrepresentations in connection with his option contract." *Gurwara*, 937 F.2d at 382 n.2.[3] The latter is precisely the claim on which the jury verdict here was based. There is no conflict with any of these decisions.[4]

Petitioners also allege a circuit conflict with the Tenth Circuit's statement of the grounds for supplemental jurisdiction over state law claims. (*See* Pet. at 12-13.) The Tenth Circuit said that the federal claim must initially have

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[2] Here, by contrast, both the Tenth Circuit and the district court found that the security at issue was the option, not the underlying stock, and that UIH was an actual purchaser of the option within the meaning of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). (Pet. App. at B-16.)

[3] The Tenth Circuit also noted that the Seventh Circuit retreated from *Gurwara*, and refused to extend its reasoning in the manner that petitioners seek, in *SEC v. Jakubowski*, 150 F.3d 675, 679 (7th Cir. 1998). (*See* Pet. App. at B-18 n.1.) The petition does not cite *Jakubowski*.

[4] As the Tenth Circuit explained, other circuits have recognized that fraud in the purchase or sale of a security includes entering into a contract to sell a security with a secret reservation not to perform. (*See* Pet. App. at B-16-17 (citing *In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1245 n.13 (3d Cir. 1989); *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986); *Threadgill v. Black*, 730 F.2d 810, 811-12 (D.C. Cir. 1984); *Richardson v. MacArthur*, 451 F.2d 35, 40 (10th Cir. 1971)).)

"substance sufficient to confer subject matter jurisdiction on the court" and that the federal claim is insubstantial "only if it is obviously without merit or is wholly frivolous, or is clearly foreclosed by prior decisions of the Supreme Court." (Pet. App. at B-13 (citations and internal quotations omitted).) This statement is entirely accurate and petitioners' argument that it does not reflect the law in all circuits is foreclosed by this Court's pronouncement that "the District Court has jurisdiction . . . unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (citations omitted).

None of the remaining three alleged conflicts implicates federal law. First, petitioners challenge the application of the now-repealed Colorado statute of frauds in this case based on the application of other states' statutes of frauds by other circuits. (*See* Pet. at 11 (citing *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690 (7th Cir. 1990); *Pelletier v. Stuart-James Co.*, 863 F.2d 1550 (11th Cir. 1989)).) The Tenth Circuit reviewed *de novo* the district court's analysis of this Colorado statute and agreed that "several exceptions took the option agreement outside the scope of the statute of frauds" (Pet. App. at B-21-25).

Second, petitioners assert a conflict with the application of Colorado's version of the so-called "economic loss rule," citing constructions of the law of other states. (Pet. at 13-14 (citing *Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318 (6th Cir. 1999); *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083 (8th Cir. 1998); *Cooper Power Sys., Inc. v. Union Carbide Chemicals & Plastics Co.*, 123 F.3d 675 (7th Cir. 1997); *Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198 (11th Cir. 1994)).) The Tenth Circuit engaged in painstaking review of the economic loss rule as applied by the Colorado courts; there is no conflict

with any other decision regarding Colorado law. (*See* Pet. App. at B-25-28.)

Third, petitioners construct a conflict based on allegations that the Tenth Circuit (and presumably the jury and the district court) "ignored the conclusive documentary record of the parties' negotiations" regarding a stock purchase agreement. (Pet. at 14.) Even a cursory review of the Tenth Circuit's recitation of the background of this case demonstrates that the Tenth Circuit did no such thing. (*See* Pet. App. at B-2-11.)

II. THE DISTRICT COURT HAD JURISDICTION OVER ALL OF THE FEDERAL AND STATE LAW CLAIMS.

Petitioners' argument that this Court should grant certiorari to address the supplemental jurisdiction of the district court is meritless. A federal court has jurisdiction under 28 U.S.C. § 1331 if the complaint states an arguable, non-frivolous claim arising under a federal statute. *Steel Co.*, 523 U.S. at 89; *see also* 13B Charles Alan Wright et al., Federal Practice & Procedure § 3564, at 70-71 (2d ed. 1984) ("The test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim, federal jurisdiction exists."). UIH clearly stated such a claim under Section 10(b) and Rule 10b-5 here. It alleged each of the elements of a Rule 10b-5 claim and had proper grounds for each allegation. Federal jurisdiction does not depend on whether the claim is upheld at trial. *See id.* § 3562, at 41 ("If it is held that federal law does not provide for the remedy, the dismissal should be on the merits rather than for want of jurisdiction."). Here, however, UIH's Rule 10b-5 claim was not only arguable but valid, as the jury found and as the district court and Tenth Circuit ruled. (*See* Pet. App. at B-18.)

The district court also had discretion to exercise supplemental jurisdiction over UIH's state law claims, all of which arose out of the same set of facts as the federal claim. *See* 28 U.S.C. § 1367(a) (conferring jurisdiction over state law claims "so related to [the federal] claims in the action . . . that they form part of the same case or controversy"). After over two years of pre-trial proceedings, an 11-week trial with 39 witnesses that resulted in six special verdicts, and a Tenth Circuit decision that rejected each claim of error on several independent grounds, no reason exists to question the district court's exercise of supplemental jurisdiction.

III. THE DISTRICT COURT PROPERLY REJECTED PETITIONERS' ARGUMENTS REGARDING CHOICE OF LAW.

Petitioners' argument that this Court should grant certiorari to address the choice of law applicable to "international business transactions" fails for at least three independent reasons. First, Section 10(b) and Rule 10b-5 apply to non-U.S. persons who come to the United States and sell securities to U.S. persons. *See SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977). The jury, district court, and Tenth Circuit all agreed that is what happened here. (*See* Pet. App. at B-19.) Second, the district court also noted that Wharf had failed to prove any pertinent difference between Colorado and Hong Kong law, and the Tenth Circuit affirmed, noting that Wharf's argument is academic at best and could not have affected the outcome of the case. (*See* Pet. App. at B-20-21.) Third, the Tenth Circuit rejected the claim that the parties had any agreement regarding choice of law. (*See id.*)

IV. THE COURTS BELOW PROPERLY RULED FOR UIH ON THE MERITS OF THE 10B-5 CLAIM.

Petitioners' argument that this Court should grant certiorari to address the application of Section 10(b) and Rule 10b-5 to "an alleged unenforceable option contract" contains

three assumptions contrary to the jury's verdict and the decisions below. First, Wharf refers to an "alleged" option, but UIH proved to the jury that Wharf sold it an option on October 8, 1992, and the district court and the Tenth Circuit agreed. (*See* Pet. App. at B-28-29.) Second, Wharf calls the option "unenforceable," an issue that was resoundingly decided against Wharf by the district court and the Tenth Circuit on state law grounds and is not independently contested in this Court. (*See* Pet. App. at B-21-25.) Third, Wharf's argument depends on the assumption that the "security" for purposes of 10b-5 is the stock underlying the option, not the option itself. The district court and the Tenth Circuit, citing precedent, held that the option is a security and was the pertinent security in this case. (*See* Pet. App. at B-15 (citing *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 1288 (D.C. Cir. 1988)).) Petitioners have made no credible argument here that the lower courts' decision was in error.

The application of Rule 10b-5 to the facts of this case is unremarkable. UIH was an "actual purchaser" of a security, an option, within the meaning of *Blue Chip Stamps v. Manor Drugs*, 421 U.S. at 751 ("the holders of puts, calls, options, and other contractual rights or duties to purchase or sell securities have been recognized as 'purchasers' or 'sellers' of securities for purposes of Rule 10b-5 . . . because the definitional provisions of the 1934 Act themselves grant them such a status"). In connection with the sale of the option, Wharf deliberately misrepresented and omitted highly material facts regarding its intention to perform. The Tenth Circuit, after reviewing the record, concluded that "UIH's allegations not only are substantial and nonfrivolous, but state an actionable 10b-5 claim." (Pet. App. at B-15.) The jury found for UIH on that claim, based on substantial evidence. Nothing here warrants this Court's review.

V. THE COMPENSATORY DAMAGES AWARD PRESENTS NO LIVE OR MERITORIOUS ISSUE.

Petitioners' argument that this Court should grant certiorari to recalculate compensatory damages, based on UIH's "reliance expenditures" rather than on the value UIH lost, is also without merit. The jury made the same award on five of UIH's claims (four under state law). The expert testimony fully supports the jury's computations, and Wharf does not challenge the legal theory of damages on any of those claims.

Wharf claims that one of UIH's experts, in testifying to the value lost by UIH, failed to subtract an estimated $50 million that UIH would have been required to invest, and that UIH counsel "misrepresented" the testimony, and hence the value of the option, to the jury. But as the Tenth Circuit noted, Wharf failed to make any objection at trial to either the testimony on the value lost *or* counsel's statement, and hence did not preserve the issue for review as a matter of law. (*See* Pet. App. at B-29-31.)[5]

Moreover, as the Tenth Circuit also recognized, the expert testimony was correct, and there was no misrepresentation whatever. (*See* Pet. App. at B-32.) The expert appropriately deducted the projected equity capital necessary to fund the cable project, including UIH's 10%

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[5] Wharf does not even mention that the Tenth Circuit ruled Wharf had waived the failure-to-subtract argument at trial. (*See* Pet. App. at B-31.) Wharf made no pertinent objection to the expert testimony, never cross-examined the expert witness on its theory that he failed to make a needed $50,000,000 subtraction, never presented its own testimony on the point, never argued the point to the jury, and never challenged UIH counsel's suggestion or proposed a corrective instruction. Wharf first raised the failure-to-subtract theory in its *reply* brief on post-trial motions and did not suggest any misrepresentation by counsel until the *hearing* on those motions, six months after the trial. The Tenth Circuit held that "no matter how liberally we construe" the standards for raising such an issue after trial, petitioners fail. (Pet. App. at B-31).

contribution. (*See id.*) It is Wharf that has persistently and wholly misunderstood the issue. Wharf deprived UIH of stock that according to the testimony (and the jury) had a value $67,000,000 *above* the $50 million in capital UIH would have contributed to the venture, which was the only price that UIH would have had to pay. No reason exists for this Court to add its review of the computation to that of the district court and Tenth Circuit.[6]

VI. THE EXEMPLARY DAMAGE AWARD PRESENTS NO MERITORIOUS ISSUE.

The only federal law issue petitioners raise with respect to the exemplary damage award is a due process claim under *BMW of North America v. Gore*, 517 U.S. 559 (1996).[7] But the jury's award of exemplary damages did not come close to "enter[ing] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Gore*, 517 U.S. at 568. In accordance with Colorado law, the jury found that UIH had proved its entitlement to exemplary damages beyond a reasonable doubt. *See* Colo. Rev. Stat. § 13-25-127(2). Two courts have now reviewed the award and found

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[6] As both courts below recognized, the only price UIH would have had to pay to exercise the option was 10% of the venture's future capital requirements, invested in the venture itself. There was no separate option price that needed to be subtracted. As the Tenth Circuit confirmed on close review, UIH's damages expert did subtract this amount to calculate what UIH had lost as a result of petitioners' fraud: he performed discounted cash flow analyses that started with the expected stream of gross receipts, subtracted expected expenses *and capital requirements*, discounted to present value, and divided by ten to determine the value of UIH's 10% share. (*See* Pet. App. at B-32.) On the evidence in this case, if Wharf had not committed fraud and breach of contract, UIH would have been $67,000,000 richer.

[7] Both courts below ruled that UIH had provided ample evidence of "willful and wanton" misconduct to satisfy the requirements of state law for the punitive damages awarded by the jury on the common law fraud and breach of fiduciary duty claims. (Pet. App. at B-35.)

it fully justified in light of the facts proved at trial, including petitioners' "utter disregard" of UIH's interests (Pet. App. at C-35 (district court)) and the "reprehensible nature of Wharf's conduct" (Pet. App. at B-39 (Tenth Circuit)).

The award easily fits all of the guidelines set forth in *Gore*. (1) The award is squarely based on "reprehensible conduct." *Gore*, 517 U.S. at 575-80. The jury found—and two courts have sustained the finding—that petitioners planned and executed a deliberate fraudulent scheme to obtain and exploit UIH's name, resources, and expertise to win a cable franchise worth over $500 million, and then to take all of the benefits of the franchise for itself. (2) The award bears a reasonable relationship to (indeed, it is smaller than) the award of compensatory actual damages. *Gore*, 517 U.S. at 580-83. *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993) (plurality opinion) (upholding punitive award 526 times compensatory damages, and ten times harm defendant's unlawful scheme would have caused had it fully succeeded); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (upholding exemplary award more than four times compensatory damages). (3) The award falls well within the range of penalties contemplated by Colorado statutes. *Gore*, 517 U.S. at 576, 583. Colorado law permits the imposition of punitive damages up to the amount of compensatory damages "in all civil actions in which damages are assessed by a jury for a wrong done . . . and the injury complained of is attended by circumstances of fraud." Colo. Rev. Stat. § 13-21-102(1)(a).

Petitioners attempt to fashion a new due process test, based on the ratio of exemplary damages to their allegations of UIH's "economic loss," rather than to the compensatory damages awarded by the jury. But the evidence was that the "value lost by UIH" because of Wharf's misconduct in 1992-1994 was $67,000,000, and the jury awarded the same compensatory damages on multiple claims, each of which the

Tenth Circuit affirmed. It is time for this case to be over and for UIH to receive the amount that the jury awarded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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